himself, determines whether or not his business is to be public. In ascertaining whether the facts which determine public service to exist, general public welfare, alone, would not seem to be enough to create public interest, since the public welfare is, to some extent, bound up in all private enterprises, but, it seems that a business is not affected with the public interest, unless there is a holding out to serve the public under conditions so monopolistic as to make it possible for the owner to oppress the public with high prices and unjust discrimination. It must necessarily rest in the discretion of the courts to apply this rule only to cases where there is an actual public necessity created.

All the facts which determine public service seem to be present in the principal case, so that it is in accordance with correct principle, as well as established authority. See *Stock Exchange* v. *Board of Trade*, supra. The case is made additionally strong because of the fact that the business is carried on in close connection with, and by means of the telegraph business, which has long been recognized as a public service company. *Parks* v. *Telegraph Co.* (1859) 22 Cal. 423.

FORMER JEOPARDY IN THE CONVICTION OF A HIGHER OFFENSE ON NEW TRIAL.—It is universally held that a defendant, who procures a judgment of conviction to be set aside, may be tried anew for the same offense. The reason given is that the constitutional protection against being twice put in jeopardy may be waived, and that the defendant's action operates as a waiver. Bishop's New Criminal Law §§ 995, 998.

The Supreme Court of the United States, by a division of five to four, has recently held, where upon an indictment for a greater offense the jury finds the accused not guilty of that offense, but guilty of a lower one included in it, and upon an appeal by the defendant, the judgment is reversed and a new trial ordered, that he may be tried on the new trial for the greater offense set forth in the indictment, of which he was previously acquitted. *Trono* v. *United States* (1905) 26 Sup. Ct. Rep. 121. The new trial will proceed as if the verdict of acquittal never had been rendered. The prevailing opinion held that the judgment is entire and that on appeal by the defendant he cannot appeal from the judgment of conviction alone, but must be considered to appeal from the judgment of acquittal as well. It then applied the doctrine of waiver to this theory of the entirety of the judgment and concluded that the accused waives his defense of prior jeopardy as to the entire judgment. Mr. Justice Holmes concurs in the result without writing an opinion. His concurrence is probably upon the ground given in his dissenting opinion in *Kepner* v. *United States* (1903) 195 U. S. 100 and not upon the ground that the judgment is single. The case can, therefore, hardly be said to be authority for that proposition. It is clear that a defendant has not the slightest intention of appealing from a judgment of acquittal in his favor. The case must accordingly stand or fall with the proposition that the verdict is indivisible.

Though the distinction is not made in the books, there would seem to be a vital difference between those cases in which the indictment contains but one count, and the only express verdict is one of guilty to a part of the charge, the acquittal as to the remainder not being express, but arising only by legal intendment from the verdict of conviction, and the cases in which the partial acquittal is expressly made by the jury. The principal case comes within the latter division, as it was explicitly pronounced in the judgment of the trial court that the defendants were not guilty of murder. In the former class of cases the verdict would of necessity be single, because the acquittal is merely an inference. In the latter class the acquittal being expressly found by the jury and not being a mere implication, there is nothing inherent in the verdict which would prevent its separation into two for the purposes of appeal.

Where the verdict contains several counts the verdict is divisible. Cooley, Constitutional Limitations, 7th ed., 469. Where it consists of but one count charging several distinct crimes the verdict is likewise separable. *State* v. *Bruffey* (1882) 75 Mo. 388. In a civil case an appeal may be taken from a part of a decree or judgment when the portion appealed from can be intelligently treated by itself. *Luck* v. *Luck* (1890) 83 Cal. 574; *Gleiser* v. *McGregor* (1892) 85 Iowa 489; *Hall* v. *M'Cormick* (1883) 31 Minn. 280. Why should not the same rule be applied where the indictment contains but one count and there is a verdict of acquittal as to the larger offense and a verdict of conviction as to a smaller offense?

The weight of authority is opposed to the view taken by the principal case, both where the acquittal is expressed and where it is implied. See cases in the margin of the dissenting opinion of Mr. Justice McKenna and 2 COLUMBIA LAW REVIEW 118. In some States, statutes have consequently been passed to the effect that the granting of a new trial places the parties in the same position as if no trial had been had. The statutes have been held constitutional. *Commonwealth* v. *Arnold* (1884) 83 Ky. 1; *State* v. *McCord* (1871) 8 Kansas 232. The right to appeal and to obtain a reversal is not a constitutional right. The legislature may attach as a condition to its exercise that the appellant surrender his constitutional protection. This reasoning cannot be applied to the defendant in the principal case, as there was no previous decision in the United States Supreme Court in accord with it, and he consequently was not in the position of relinquishing a constitutional right to obtain a privilege.

It may be that the decision of the Supreme Court is sound in policy, as it will frequently deter guilty defendants from seeking a reversal of their conviction and will not usually have that effect upon those who are innocent. It, however, deprives a defendant of his constitutional right.

IMPAIRMENT OF CONTRACT OBLIGATION WITHOUT ACTUAL LOSS.— The doctrine of the United States Supreme Court, enunciated in *Green* v. *Biddle* (1823) 8 Wheat. 1, adopted in *Bronson* v. *Kinzie* (1843) 1